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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF APPELLEES.

IVAN A. ELLIOTT,
Attorney General of State of Illinois,
160 North La Salle Street,
Chicago, Illinois,

JOHN T. CHADWELL,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

FRANK M. PFEIFER,
Special Assistant Attorney General,
Security Building,
Springfield, Illinois,

RICHARD M. KECK,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

Attorneys for Appellees.

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BRIEF OF APPELLEES.

OPINION AND REPORT BELOW.

The opinion of the Supreme Court of Illinois (R. 316-324) is reported in 412 Ill. 321; 106 N. E. 2d 510.

JURISDICTION.

Jurisdiction to review this case is based upon subsection 2 of Section 1257 of Title 28 of the United States Code; Act of Congress June 25, 1948, c. 646(2), 62 Stat. 929.

STATEMENT OF THE CASE.

This case concerns the validity, under the Federal Constitution, of an act of the Sixty-seventh General Assembly of Illinois approved by the Governor of Illinois on July 9, 1951 entitled "An Act to amend Sections 9, 11a and 20 and to repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 9l of the 'Motor Vehicle Law' approved June 30, 1919 as amended". For the convenience of the Court we will hereinafter refer to the 1951 amendatory act as the "1951 Act".

As indicated by its title the 1951 Act was amendatory of the Illinois Motor Vehicle Law of 1919. We believe a brief outline of the history and nature of the basic Motor Vehicle Law will be helpful in approaching a consideration of the issues in this case. The Motor Vehicle Law was first adopted in 1919 and, subject to various amendments subsequently adopted, remains in effect at the present time. (Ill. Rev. Stat. 1951, Chap. 95½, Secs. 1 *et seq.*)

By Section 2 of the law, motor vehicles are classified into two divisions. Those of the first division are defined as vehicles designed for carrying not more than seven passengers—i.e., passenger cars in the popular sense. The second division is comprised of vehicles designed for pulling or carrying freight, vehicles designed for carrying more than seven passengers and all vehicles not falling within the first division—in short, trucks, busses, tractors, trailers and the like.

From 1919 to date the Motor Vehicle Law has imposed a flat annual registration fee with respect to passenger cars graduated in accordance with the horsepower of the vehicle. (Ill. Rev. Stat. 1951, Chap. 95½, Sec. 8.) The 1951 Act makes no increase or change in passenger car license fee rates and the same are not involved in this case.

Continuously since adoption of the Motor Vehicle Law in 1919 flat annual taxes have been imposed with respect to trucks, busses and other vehicles of the second division. Such taxes have at all times been based upon the gross weight of the vehicle and maximum load and have been graduated in accordance with weight brackets or classifications. By amendments adopted from time to time new weight brackets have been added, existing weight brackets revised, and separate classifications and brackets established for special types of vehicles such as trailers and certain types of busses.

In 1921 Section 9a was added to the Act. This section imposed, in addition to the annual flat taxes, a tax on certain carriers for hire at the rate of one-half cent per mile for freight carriers and one-twentieth of a cent per mile per passenger seat for passenger carriers. In 1923 Section 9a was amended and thereafter until 1935 an annual tax, in addition to the annual flat taxes, was imposed upon certain types of carriers of passengers and freight for hire at the rate of $1.00 and later $1.50 per 100 pounds gross weight of vehicle and load. These additional taxes were imposed with respect to a limited class of carriers operating over fixed routes at fixed schedules of rates and the same were discontinued in 1935.

In 1935 the Motor Vehicle Law was amended to include for the first time a so-called optional mileage weight tax (Laws 59th G.A., 1935, p. 1233). This was a tax measured by the number of miles actually travelled in Illinois by the vehicle and graduated as to rates in accordance with the gross weight of the vehicle and load. Monthly reports and payments of tax were required. Vehicle operators were granted an option to register and be taxed under either the annual flat tax or under the mileage tax provisions. They were not required to pay both.

The Motor Vehicle Law has at all times specifically provided that all taxes upon vehicles of the second division were imposed "for the use of the public highways" of the State. (Appendix I, Section 9.) By Section 36 of the Motor Vehicle Law (Ill. Rev. Stat. 1951, Chap. 95½, Sec. 50) all motor vehicle registration and license taxes collected are required to be set apart in a special "road fund" and used solely for construction, reconstruction, maintenance and patrolling of the public highways and administration of the Act.

The principal changes in the Motor Vehicle Law effected by the 1951 Act may be summarized, generally, as follows:

1. Effective January 1, 1952 the annual flat taxes for vehicles of the second division were increased with provision for further increases effective January 1, 1954.

2. The optional mileage weight tax was repealed thus subjecting all vehicles of the second division to the annual flat tax provisions.

3. Certain flat tax weight brackets were revised and new weight brackets added.

4. Separate weight brackets and tax rates were established for busses operating within municipalities or a close radius thereof.

We think it appropriate to point out here that the rate increases provided by the 1951 Act are the first significant or substantial increases in annual flat taxes on vehicles of the second division since the original enactment of the Motor Vehicle Law in 1919. For thirty-two years annual flat taxes on trucks, busses and trailers remained at substantially the 1919 level. These facts are illustrated by the chart appearing at page 309 of the Record (offered at R. 195). This chart does not reflect the addi-

tional taxes imposed from 1921 to 1935 upon a limited class of carriers for hire nor does it reflect the optional mileage tax in effect from 1935 to 1952. The insignificance of these omissions for present comparative purposes is illustrated by the fact that in 1951 there were only 151 carriers of the class affected by the additional taxes in effect from 1921 to 1935. (See *Bode et al.* v. *Barrett et al.*, No. 187; R. 227, offered at R. 78.) Obviously the class would have been much smaller in the earlier years 1921 to 1935. The small number of vehicles affected by the optional mileage weight tax is illustrated by the fact that in 1949 only 11,935 vehicles out of a total vehicle registration of 336,044 or about 3.5 per cent elected to pay the mileage tax rather than the annual flat tax. (R. 307, columns 1, 2 and 3; offered at R. 195.)

SUMMARY OF ARGUMENT.

I.

Appellants have no standing to challenge the 1951 Act under Section 8 of Article I of the Federal Constitution.

In the court below appellants challenged the validity of the 1951 Act under the commerce clause of the Federal Constitution. The fact that the Illinois court decided this issue on the merits does not serve to qualify appellants to raise the issue in this Court. In this Court only those within the class as to whom the unconstitutional burden is claimed to exist may raise the objection. Appellants are all intrastate truckers. Some of them, in addition to their intrastate activities, engage in making interstate trips from Illinois into other states. An intrastate trucker pays no additional tax for engaging in interstate commerce and if he carried on no interstate operations he would still pay the same tax. Thus, no appellant is within the class of interstate carriers as to whom the unconstitutional burden is claimed to exist and no question concerning the validity of the 1951 Act under the commerce clause is properly before this Court.

II.

The 1951 Act does not impose an undue burden on interstate commerce in violation of Article I, Section 8, and Amendment XIV, Section 1 of the Constitution of the United States as asserted in Point IA of Appellants' brief.

Both the formula on which the 1951 Act is based and the resulting taxes imposed are rational, fair, reasonable and not in excess of fair compensation for the privilege of un-

limited use of the Illinois highways. In passing the 1951 Act the Illinois legislature adopted a tax schedule based upon a fair and reasonable theory calculated to equalize taxes paid by truck operators with those paid by passenger car operators on a ton-mile basis. The revenue which will be raised by the 1951 Act, together with revenue derived under the Motor Fuel Tax Act, will not exceed the State's needs for highway purposes but will equal only approximately sixty per cent of such needs.

The tax formula and schedule advocated by Worley, a witness for appellants, is based upon arbitrary assumptions and factors admitted by Worley to be highly controversial. In any event, the choice between two theories or formulae rests within the broad discretion of the legislature and is not subject to judicial review.

Appellants' argument that the taxes imposed by the 1951 Act discriminate against trucks in favor of passenger cars is unsupported in fact since the 1951 Act equalizes taxes paid by trucks with those paid by passenger cars. Further, this Court has specifically recognized the right of a state to separately classify and tax passenger carrying vehicles as distinguished from property carrying vehicles.

III.

The 1951 Act does not impose taxes excessive in amount and unconstitutional as asserted in Point IB of Appellants' brief.

The amount of the taxes imposed by the 1951 Act is reasonable and not in excess of fair compensation for the unlimited privilege of using the Illinois highways. The increases provided by the 1951 Act are the first substantial increases in motor vehicle license fees since 1919. The

State must receive additional revenue for highway purposes in view of increases in highway construction and maintenance costs and the vast expansion and improvement of the highway system. The taxes imposed by the 1951 Act are not the highest imposed by any state as asserted by appellants. In view of increased highway maintenance and construction costs and present inflationary dollar values it is unfair to compare the taxes imposed by the 1951 Act with those of other states approved or considered by this Court at an earlier period.

Examples of increases of taxes under the 1951 Act as applied to certain appellants are without significance. Appellants have failed to sustain the burden, which rested upon them, of establishing that the 1951 Act imposes an unconstitutional burden upon interstate commerce. Even if this Court should hold the 1951 Act to be invalid as applied to interstate operations nevertheless each of appellants would still be required to pay the tax on account of his extensive intrastate operations.

IV.

The taxes imposed by the 1951 Act are not confiscatory or violative of the Fourteenth Amendment of the Constitution of the United States.

Only 14 of the 54 appellants testified at the trial of this cause. There is no evidence in the record establishing that they are representative of a fair cross section of the many thousands of concerns engaged in trucking in Illinois and hence there is no factual support for appellants' assertion that the 1951 Act is confiscatory of the entire trucking industry of the State of Illinois. The fact that a tax may be burdensome or result in driving a particular taxpayer out

of business does not render the tax invalid under the Fourteenth Amentment. Where a legislature has the power to lay a tax as a revenue measure there is no constitutional limitation upon the amount of the tax that may be imposed.

V.

The 1951 Act does not contain arbitrary, inconsistent, vague and uncertain classifications in violation of the Fourteenth Amendment.

Appellants assail nine separate provisions as arbitrary, inconsistent, vague and uncertain in violation of the Fourteenth Amendment. All such contentions were resolved adversely to appellants by the Supreme Court of Illinois and the same are without merit.

1. Subsections (h) and (i) of Section 9 of the 1951 Act are not inconsistent or overlapping. The evidence in the record shows that no four wheeled vehicles weighing in excess of 30,000 pounds have ever been found to be operating in Illinois except in a few cases, in each of which such vehicles were operating illegally in that the rear axle weight exceeded the limitation specified in Section 228 (a), Chap. 95½, Ill. Rev. Stat. 1951.

2. Subsections (i-3) and (i-4) of Section 9 of the 1951 Act are not overlapping and inconsistent. Vehicles having ten or more wheels are taxed under subsection (i-4) and not under subsection (i-3).

3. The provisions of the 1951 Act affording lower tax rates to certain passenger carrying busses operating within a municipality or a close radius thereof are not arbitrary or discriminatory. The separate classification and taxation of passenger carrying vehicles as distinguished from

freight carrying vehicles has been approved by decisions of this Court.

4. Appellants' contention that the 1951 Act does not tax a six or more wheeled vehicle under 30,000 pounds gross weight is without merit. Such a vehicle weighing from 24,000 to 30,000 pounds is taxable under Section 9 (i), one weighing from 20,000 to 24,000 pounds is taxable under Section 9 (h), and one weighing less than 20,000 pounds is taxable under preceding subsections of Section 9.

5. The requirement of the 1951 Act that the operator of a tractor designed to pull a semi-trailer pay a registration fee for the combined weight of the tractor and a semi-trailer is reasonable.

6. The terms "gross weight" and "maximum load" used in Section 9 of the Act are not vague, uncertain and incapable of understanding and the Supreme Court of Illinois has specifically found that those provisions have a well understood meaning and a continuity of legislative and administrative interpretation over a period of thirty-two years.

7. The phrase "like exemptions and privileges" appearing in Section 9 of the Act is not vague, uncertain and incapable of clear understanding. The legislature intended that the tax provisions of another state's laws be measured against the provisions of the Illinois law and such cannot be said to result in uncertainty.

8. The phrase "a close radius thereof" is not indefinite and uncertain. A definite and certain meaning has been ascribed thereto by the Supreme Court of Illinois and hence appellants' contention presents no question for review by this Court.

9. Appellants' contention that the phrase "agricultural pursuits" is vague and indefinite is without merit.

ARGUMENT.

I.

Appellants have no standing to challenge the 1951 Act under Section 8 of Article I of the Federal Constitution.

In point I of their brief (Appellants' Brief, pages 16 to 46) the appellants challenge the 1951 Act upon the ground that it imposes an unlawful burden upon interstate commerce in violation of Section 8 of Article I of the United States Constitution. We think it well at the outset to call to the attention of the Court the fact that there is no appellant in this case entitled to challenge the Act under the commerce clause.

The appellants in this case (plaintiffs below) are fifty-four in number and all are engaged in extensive intrastate trucking operations within Illinois (R. 2, 3, 31, 32). Thirty-three of appellants are individuals who are residents of Illinois. Nineteen of appellants are corporations organized and existing under the laws of Illinois and two of appellants are foreign corporations licensed and qualified to do business in Illinois. All appellants maintain places of business in Illinois from which they conduct their intrastate operations making use of the Illinois highways. Some of the appellants, in addition to their Illinois intrastate operations, use their trucks in making interstate trips from Illinois into other states. Seven appellants testified that by virtue of Illinois license plates on their trucks they were granted reciprocity in other states into which they made trips and paid no license fees outside of Illinois (R. 46, 59, 60, 63, 67, 70, 79, 99). None testified that additional taxes were paid

to any other state for the privilege of using highways in interstate commerce.

Thus it will be seen that the appellants here seeking to claim an unconstitutional burden upon their interstate operations are all Illinois residents or concerns having places of business in Illinois from which intrastate operations are conducted. As such they make extensive use of the Illinois highways and are taxed on a parity with all other Illinois truck owners and operators. Some of appellants, in addition to their intrastate operations, have chosen to engage in making interstate trips from Illinois into other states, but in so doing such appellants are treated no differently taxwise from any other Illinois truck operator. The license fees which they pay to Illinois give them the full privilege of unlimited use of the Illinois highways for the registration period and, in addition, afford them reciprocity in other states into which they make interstate trips. The license fees paid to Illinois by appellants are neither increased nor diminished by reason of the fact that some of appellants engage in interstate as well as intrastate operations. Those appellants whose operations are wholly intrastate could commence interstate operations without the payment of additional taxes. Likewise, those appellants who are engaged in interstate operations could, if they chose, cease such operations but would nevertheless be required to pay the Illinois taxes because of the use of the Illinois highways in their intrastate operations.

Since all of the appellants are engaged in extensive intrastate operations in Illinois and are therefore required to pay the Illinois license fees irrespective of whether or not they engage in interstate operations, they are in no position to urge that the Illinois taxes amount to an unlawful burden upon their interstate operations.

In *Southern Railway Co.* v. *King*, 217 U. S. 524, this Court said (page 534):

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."

See also, *Missouri, Kansas and Texas Ry.* v. *Cade*, 233 U. S. 642, 648; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Hendrick* v. *Maryland*, 235 U. S. 610, 621; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 595-596.

The fact that the Illinois courts may have considered on the merits the question of whether the 1951 Act constitutes an unlawful burden on interstate commerce does not serve to give the appellants in this case a right to raise that constitutional question in this Court. Despite the fact that a state court may pass on the merits of a constitutional question, an appellant, to be entitled to a review by this Court, must show that he is directly and personally aggrieved by the statute. This the appellants here cannot do. *Tyler* v. *Judges*, 179 U. S. 405, 410; *Smith* v. *Indiana*, 191 U. S. 138; *McCandless* v. *Pratt*, 211 U. S. 437; *Southern Railway Co.* v. *King*, 217 U. S. 524.

A case directly in point is *Miles* v. *Department of Treasury*, 209 Ind. 172; 199 N. E. 372 (appeal dismissed 298 U. S. 640), where appellants brought an action as taxpayers on behalf of themselves and others similarly situated to enjoin state officials from paying out state funds for the printing of the Gross Income Tax Act of 1933 on the ground that the statute was violative of both the State and Federal Constitutions. The Supreme Court of Indiana considered the

claims of unconstitutionality on the merits and upheld the validity of the Act. In dismissing the appeal this Court said (298 U. S. 640):

> "The appeal herein is dismissed upon the ground that the appellants have failed to show any interest entitling them to invoke the protection of the Federal Constitution. *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 406, 407, 410; *Southern Ry. Co.* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550."

II.

The 1951 Act does not impose an undue burden on interstate commerce in violation of Article I, Section 8, and Amendment XIV, Section 1 of the Constitution of the United States as asserted in point IA of Appellants' Brief.

In point IA of their brief appellants contend that the 1951 Act amounts to an unlawful burden on interstate commerce in violation of the commerce clause and also the equal protection clause of the Fourteenth Amendment of the Federal Constitution. We will first answer the appellants' claims under the commerce clause and, secondly, their contentions under the equal protection clause of the Fourteenth Amendment.

Appellants' claims under the commerce clause.

We have shown in point I, above, that the appellants, because of their intrastate operations in Illinois are not members of the class as to whom the unconstitutional burden on interstate commerce is claimed to exist and hence have no standing to challenge the 1951 Act under the commerce clause. However, we will demonstrate that, considered on

the merits, their contentions as to the existence of an unconstitutional burden on interstate commerce are without foundation.

At page 18 of their brief appellants refer to the case of *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542. They assert that the State erroneously contends the *Brice* case establishes the proposition that whether a state motor vehicle tax imposes an unconstitutional burden on interstate commerce is to be determined by considering the result of the tax rather than the formula fixing the tax. Appellants continue their argument on pages 19, 20, and 21 in an attempt to demonstrate that such is not in fact the holding of the *Brice* case. Immediately thereafter, with startling inconsistency, appellants make the following statements:

> "It seems obvious that if a legislature devised a tax schedule based on an improper formula, or, indeed, based on no formula at all, and that schedule did in fact by chance bear a reasonable relationship to the value of the privilege granted, that tax would be every bit as valid as one based on a reasonable, logical and valid formula." (Appellants' Brief, pp. 21, 22.)

> "In the *Brice* case the Court has clearly stated that the Court will determine whether the resulting tax schedule bears a reasonable relationship to the value of the privilege granted without regard to the formula used by the legislature in arriving at that result." (Appellants' Brief, p. 22.)

We think it only necessary to point out that in the *Brice* case this Court said (339 U. S. 542, 545):

> "Later, in rejecting contentions that the validity of taxes must be determined by formula rather than result, the Court held that a flat fee on the privilege of using state highways 'is not a forbidden burden on interstate commerce' unless 'unreasonable in amount.' *Morf* v. *Bingaman*, 298 U. S. 407, 412. See also *Aero Transit Co.* v. *Comm'rs*, 332 U. S. 495, and annotation thereto, 92 L. Ed. 109, 119-120. Yet clearly a flat fee

> is not geared to mileage, weight or any other factor relevant in considering the fairness of compensation for road use. Thus, unless we are to depart from prior decisions, the Maryland tax based on the cost of the vehicles should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted."

However, we believe that extended discussion of the holding of the *Brice* case is unnecessary for we will demonstrate that both the formula on which the 1951 Act is based and the resulting taxes imposed are rational, fair, reasonable and not in excess of fair compensation for the privilege of unlimited use of the Illinois highways.

The evidence on behalf of the State shows without dispute that in passing the 1951 Act the Illinois General Assembly fixed the tax rates in accordance with the findings and recommendations of a study made by the Illinois Department of Public Works and Buildings. This study and the evidence in support of the same were presented at the trial by Frank N. Barker, Chief Highway Engineer of the Department of Public Works and Buildings (R. 152-162; 180-205). Mr. Barker identified and explained Defendants' Exhibit 7[1] (R. 307; offered at R. 195) as having been prepared under his direction and supervision. This exhibit is a statistical table reflecting in detail calculations made to equalize payments of motor vehcle license fees and motor fuel taxes[2] by operators of trucks, busses and other vehicles of the second division with those made by operators of passenger cars on a ton-mile basis. In his testimony Mr. Barker gave

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[1] Defendants' Exhibit 7 in this case is the same document as Defendants' Exhibit 2 in *Bode et al* v. *Barrett et al*, No. 187. (R. 188)

[2] The Motor Fuel Tax Law imposes a tax "on the privilege of operating motor vehicles upon the public highways of this State", at specified rates per gallon of fuel consumed in vehicles upon such highways. (Ill. Rev. Stat. 1951, Chap. 120, Sec 418). Section 8 of that Act (Chap. 120, Sec. 424) requires that all taxes collected under the Act be placed in a special fund in the State Treasury to be known as the "Motor Fuel Tax Fund" and devoted to public highway purposes.

an explanation of the various columns and calculations reflected on Defendants' Exhibit 7 (R. 307; offered at R. 195). His testimony in this regard appears at pages 183 to 186 of the Record. A summary of this evidence is set forth in the opinion of the Supreme Court of Illinois in *Bode et al.* v. *Barrett et al.*, 412 Ill. 204, 215-216.

The study established that Illinois passenger car operators paid motor vehicle license taxes and motor fuel taxes (the proceeds of which are used exclusively for highway purposes) equivalent to $0.00251 per ton-mile of travel per vehicle (R. 307, Column 17; offered at R. 195). The study further showed that, except with respect to trucks of 3,000 pounds or less gross weight, motor truck operators were paying substantially less taxes per ton-mile than were passenger car operators. In making such calculations it was necessary to take into consideration the average miles travelled per year by the various weight classifications of vehicles. The source of such annual average mileage figures was summarized by the Supreme Court of Illinois in its opinion in the *Bode* case, 412 Ill. 204, 215, as follows:

> "These figures were taken from a comprehensive report made in 1948 covering the Illinois highway problem by an independent engineering concern employed by the State of Illinois for that purpose.
>
> From evidence introduced at the trial, such average travel-per-year figures were based on the results of a questionnaire survey of motor vehicle owners and operators made in the late thirties in Illinois and other States, as were other figures used, such as fuel consumption, modified as justified by later information."

The study then proceeded to determine what amounts of annual motor vehicle flat taxes should be paid with respect to the various weight classifications of trucks in order to equalize the ton-mile payments of motor vehicle taxes and

motor fuel taxes by truck operators with those paid by passenger car operators.

The results of the study, in summary form, are shown in the following table taken from Defendants' Exhibit 7 (R. 307; offered at R. 195):

	Trucks	Average Travel Per Year (4)	License Fee as Equalized (22)	License Fee S. B. 96 Effective Jan. 1, 1954 (23)
A	3000# and less	7,500	$ 1.62	$ 5.00
B	3001# to 8000#	10,000	21.29	21.00
C	8001# to 10000#	12,500	57.66	58.00
D	10001# to 12000#	16,000	87.11	87.00
E	12001# to 14000#	18,500	113.89	114.00
F	14001# to 16000#	20,500	141.24	141.00
G	16001# to 20000#	23,500	215.89	216.00
H	20001# to 24000#	28,000	351.96	352.00
Bus	24000# to 36000#	30,000	545.60	545.00
X	24001# to 41000#	36,500	809.67	588.00 810.00 890.00
K	41001# to 45000#	36,500	979.61	980.00
L	45001# to 50000#	36,500	1,097.96	1,098.00
N	50001# to 59000#	36,500	1,244.81	1,245.00
P	59001# to 72000#	36,500	1,587.98	1,588.00

The left hand column indicates the various weight classifications of vehicles. The second column numbered "4" shows the average annual mileage figures used in making the calculations contained in the study. The third column numbered "22" shows the amount of the annual license fee for each weight classification required to accomplish equalization with passenger cars. The fourth column numbered "23" reflects the schedule of license fees effective January 1, 1954 as adopted in the 1951 Act.

It will be seen from the foregoing that, with immaterial modifications, the Illinois legislature in passing the 1951

Act adopted the schedule of license fees resulting from the equalization study and a finding to this effect was made by the Supreme Court of Illinois in the *Bode* case, 412 Ill. 204, 216:

> "Flat license fees per weight bracket as adopted by the 1951 amendment apply and adopt the license fees as thus equalized, rounded out to the nearest dollar."

It should be noted that the taxes imposed by the 1951 Act will not produce revenue in excess of the State's needs for highway purposes. The evidence demonstrates that during the 1951-60 period the State will have a total need for $1,151,041,232.00 for highway purposes (Defendants' Exhibit 2a; R. 293; offered at R. 158) and that the revenue produced by the 1951 Act, together with taxes collected under the Motor Fuel Tax Act will yield a net amount available for highway purposes of only $676,961,887.00 (Defendants' Exhibit 2 b; R. 294; offered at R. 158), leaving a deficiency of $474,079,345.00 (R. 293, 294). This fact was confirmed by the Supreme Court of Illinois which stated in its opinion in the *Bode* case, 412 Ill. 204, 228:

> "The evidence clearly discloses that the Motor Vehicle Law and the Motor Fuel Tax Act impose taxes which will produce approximately sixty percent of the revenues needed by the State for maintenance, improvement and construction of State highways in the next several years, and under the terms of said acts such revenues must be so used."

Appellants do not question that the total revenue calculated to be raised by the 1951 Act is reasonably required to meet state highway needs (Appellants' Brief, page 4).

The argument of appellants in Point IA of their brief is bottomed principally upon the testimony of one Worley. Witness Worley is a former professor of the University of Michigan who, since his retirement from academic ac-

tivities some five or six years ago, has been employed or identified with numerous state trucking associations (R. 133, 134). By his testimony this witness propounded a formula for calculating motor vehicle license fees based in part on the ton-mile theory and in part on an average annual vehicle-mile basis. As indicated on page 23 of the Appellants' Brief, the calculations of this witness were presented in six exhibits which he had prepared (Plaintiffs' Exhibits 11 through 16, inclusive; R. 265-276; offered at R. 133) and which were based in large part on the same data as used in Defendants' Exhibit 7 (R. 307; offered at R. 195). In his calculations Worley accepted and used all of the basic statistical information shown in Defendants' Exhibit 7 (R. 307; offered at R. 195), including the vehicle registration figures, average mileage figures and statistics relating to gasoline consumption and motor fuel tax revenue.

Worley's theory or formula is based upon the assumption that certain highway construction and maintenance costs are attributable to the weight of the vehicles while other such costs are not attributable to weight. Pursuing this basic assumption Worley arbitrarily allocated certain construction and maintenance costs on a percentage basis between factors which he considered to be attributable to weight and factors not attributable to weight. The percentage allocation of the various items are indicated in table form on page 30 of appellants' brief. The portion of the total highway costs which Worley attributed to weight he then distributed back among the various vehicle classifications, including passenger cars as well as trucks, on a ton-mile basis. The portion of the highway costs which he considered were not attributable to weight he distributed back among all vehicles, including passenger cars,

on a straight vehicle-mile basis, using for this purpose the State's annual average mileage figures appearing in Defendants' Exhibit 7 (R. 307; offered at R. 195). As a result of his calculations Worley arrived at a tax schedule which is reflected in column 8 of Plaintiffs' Exhibit 15 (R. 273; offered at R. 133). The net result of Worley's calculations is a tax schedule which, as contrasted with the Illinois license fees in effect prior to the 1951 Act, would accomplish the following—the tax on pleasure cars would be more than doubled; the tax on trucks in the lighter classifications would be increased; and the fees on trucks in the heavier classifications would be only slightly increased and in some cases reduced. The reason for the difference between the tax schedule proposed by Professor Worley and that adopted by the Illinois legislature in the enactment of the 1951 Act is apparent when it is considered that with respect to many items of highway costs Worley attributed from 40 to 100 per cent as "not due to weight" and allocated such expenditures to all vehicles on a straight average per annum vehicle-mile basis.

Appellants assert at page 22 of their brief that Worley's testimony was offered "not as a substitute formula for the legislature, but to demonstrate how the formula was misapplied, and as a competent yardstick for the Court to use in determining whether the result was proper, and bore relation to the value of the privilege granted." We think it is apparent, however, that appellants and witness Worley are in fact proceeding upon the theory that the formula used by Worley for calculating motor vehicle license fees is the *only* proper or rational theory or formula upon which a motor vehicle tax schedule can be based; that the tax schedule adopted by the Illinois legislature as embodied in the 1951 Act differs from the theory or formula

advanced by Worley and hence is arbitrary, unreasonable and unconstitutional. In referring to Plaintiffs' Exhibit 15 (R. 273; offered at R. 133), which as we have mentioned above, contained the proposed tax schedule arrived at as a result of Professor Worley's calculations, he made the bald assertion:

> "It is my opinion that any tax schedule which does not come out with the various figures which I have listed here under column 8 is an irrational tax schedule" (R. 143).

He made the foregoing assertion despite the fact that throughout his testimony on cross-examination he admitted his theory of allocation of construction and other highway costs is highly controversial. For example, Worley testified that the allocation of highway costs among different classes of vehicles is a controversial subject and has been for a number of years and that highway engineers have differed on this subject in the past and still do differ (R. 134). He further testified that whether the allocation of construction costs as between items due to weight and items not due to weight is the generally accepted view among highway engineers was not known to him and that he did not know what their views were (R. 141, 142). He also admitted that his allocation of construction costs as 60 per cent due to weight and 40 per cent not due to weight was his best judgment but that he could cite qualified engineers who would not make the same allocation (R. 142). In addition, he admitted that his allocation of administrative expenses and his allocation of interest were both controversial (R. 142) and that in Plaintiffs' Exhibit 14 (R. 271; offered at R. 133) he had allocated the item "Other" as being entirely not due to weight although he did not know what items were included under this heading (R. 142, 143). Worley further admitted that under his theory the alloca-

tion of such items as "Right-of-way" might be considered controversial and in fact that "everything could be controversial" (R. 143). In referring to the ton-mile theory adopted by the State, Worley contended that it was unsound but at the same time admitted there is a great difference of opinion about it among highway engineers; that he didn't know to what extent the ton-mile theory of calculating costs has support among highway engineers; and that it is a controversial subject (R. 145).

On the contrary, Mr. Barker, Chief Highway Engineer of the State of Illinois, testified for the State that the ton-mile theory has general acceptance among highway engineers as a valid theory and that in his opinion it is a valid theory of cost allocation (R. 186-188). Mr. Barker further testified he did not agree with Worley that an allocation can properly be made as between items due to weight and those not due to weight (R. 189). He also stated that his opinion in this respect found support among competent authorities in the highway engineering division and he cited and quoted at length from several authorities who criticized the validity of a theory such as that advanced by Worley (R. 189-194).

Analyzing the testimony of Worley, the most that can be said for it is that he advanced a theory or formula for calculating motor vehicle taxes different from the ton-mile theory as explained by witness Barker and as adopted by the Illinois legislature in the 1951 Act. Worley himself admitted his theory to be highly controversial and not in accord with the opinion of a substantial number of highway engineers. On the other hand, Mr. Barker testified that there is a substantial body of expert highway engineers opinion favoring the ton-mile theory and opposing the allocation theory advanced by Worley.

The net of the evidence in the record is that two theories of calculating a schedule of motor vehicle license fees have been advanced, one by the appellants and one by the State. It is apparent that such a situation leaves room for legislative judgment and it is also apparent that which theory is to be selected is within the province of the legislature and not the courts. The legislature has a broad range of discretion and is free to adopt the theory it believes most sound without judicial interference.

In *Sproles* v. *Binford*, 286 U. S. 374, a Texas statute forbade operation of any motor vehicle carrying a net load of freight exceeding seven thousand pounds. This was attacked as violative of the Commerce Clause and the Fourteenth Amendment of the Constitution. It was contended that the net load limitation as contrasted with a possible gross load limitation, was "opposed to sound engineering opinion" and hence invalid. In overruling this contention this Court said (page 388):

> ". . . Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."

Again this Court, in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546, in discussing factors involved in state motor vehicle tax formulas, said:

> "These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.'"

Also in *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, this Court said at page 594:

> ". . . Hence, in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis. This is equally the case where the classification, which is one which the legislature was competent to make, is applied to vehicles using the state highways in interstate commerce."

Further, we call attention to the fact that the Supreme Court of Illinois, in the *Bode* case, 412 Ill. 204, made the following finding of fact at page 228 of its opinion:

> "The evidence clearly discloses that the Motor Vehicle Law and the Motor Fuel Tax Act impose taxes which will produce approximately sixty per cent of the revenues needed by the State for the maintenance, improvement and construction of State highways in the next several years, and under the terms of said acts such revenues must be so used. It also appears that the Motor Vehicle Law imposes a tax on trucks graduated according to weight bracket which, when combined with the motor fuel taxes paid, will approximately equalize the taxes paid per ton-mile of all motor vehicle operators, passenger and truck. The taxes imposed by the amended act have a reasonable basis, are not discriminatory, and do not produce a revenue in excess of fair and reasonable compensation for the privilege of using the State roads. The act is not arbitrary nor discriminatory in violation of the due process clauses of either the Federal or State constitutions."

We submit, there is nothing novel in framing a state motor vehicle tax law on the ton-mile theory. This Court has heretofore sustained annual lump sum state vehicle taxes graduated in amount in accordance with vehicle weight irrespective of miles traveled. *Hicklin* v. *Coney*,

290 U. S. 169; *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72; *Clark* v. *Poor*, 274 U. S. 554. Also this Court has sustained against attack under the commerce clause a state tax based upon gross ton-miles traveled by the vehicle. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352. While it is true that the underlying theory of the tax imposed by the 1951 Act involves average annual miles traveled by vehicles classed according to weight and not actual mileage traveled by each individual vehicle, it should be noted that appellants do not complain of the State's tax formula on this account. In fact, the Worley theory or formula promulgated by appellants accepts and uses the same annual average mileage statistics as are involved in the State's calculations.

At pages 16 to 18 of their brief appellants cite and rely upon *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, *Prouty* v. *Coyne*, 55 F. 2d. 289, and *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, and at page 36 of their brief appellants state that in each of these cases a state motor vehicle law was declared unconstitutional "because the formula used produced a tax that was not an accurate measure of the benefit received from the use of the state's highways". We submit that appellants misinterpret the holdings of these cases.

A careful reading of *Sprout* v. *South Bend*, 277 U. S. 163, and *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, in the light of the subsequent holdings of this Court in *Hicklin* v. *Coney*, 290 U. S. 169, 173, and *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495, 504, demonstrates that the state vehicle taxes in the *South Bend* and *Lindsey* cases were stricken down not on the basis that the formula involved in the tax was improper but rather because of the fact that each of those cases in-

volved a tax laid "not as compensation for the use of the highways but for the privilege of doing the interstate bus business". *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495, 504.

Prouty v. *Coyne*, 55 F. 2d 289, was a decision in 1932 by a statutory three-judge United States District Court for South Dakota. The opinion was written by United States Circuit Judge Gardner. The court's decision is clearly contrary to *Hicklin* v. *Coney* (1933), 290 U. S. 169, and other later decisions of this Court. This was clearly recognized by Judge Gardner and other judges of the Eighth Circuit in *Brashear Freight Lines* v. *Public Service Commission of Missouri* (1938), 23 F. Supp. 865. The *Brashear* case was likewise decided by a statutory three-judge court. There certain truckers complained that the Missouri license fee was invalid because it was a flat annual tax not apportioned to mileage traveled in the state. The court, in a *per curiam* opinion, Judge Gardner participating, said (868):

> "It is next contended that the fees are invalid as a matter of law because they are assessed on a flat rate annual basis, do not vary according to mileage traveled, and are not predicated upon the use made of the highways. In effect this is the same contention considered above. In addition to that which has already been said on the subject it is appropriate to note that the fees assessed are asserted by the Legislature to be for the sole purpose of maintenance, and proper care of the highways. . . . Under the facts of this case such cases as *Ingels* v. *Morf*, 300 U. S. 290, . . . *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, . . . and *Sprout* v. *South Bend*, 277 U. S. 163, . . . are inapplicable."

The inapplicability of the *McCarroll* case, 309 U. S. 176, to a situation involving a state motor vehicle tax laid for

the purpose of exacting compensation for the use of the highways of the state is made clear by this Court's decision in *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495, 504.

In addition to the foregoing, appellants, at page 17 of their brief, cite and rely upon *Ingels* v. *Morf,* 300 U. S. 290. In that case the State of California imposed a license fee and the statutory enactment recited that the fee was a charge for regulating traffic. This Court held the charge excessive as a purely regulatory fee. Thereafter the Legislature of California repassed the Act and in the amended act recited that the fee was both for regulating the traffic and to provide funds for constructing and maintaining the highways. Subsequently this Court held the amended act valid in *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583.

Appellants' Claim Under the Equal Protection Clause.

Although appellants' reasoning is obscure it is apparent from the heading of point I of their brief and the quotation from Section 1 of Amendment XIV appearing in the argument on page 16 of their brief, that they contend the 1951 Act is violative of the equal protection clause of the Fourteenth Amendment. Appellants cite no authority in support of this contention. All decisions cited in point IA of their brief concern the validity of motor vehicle taxes under the commerce clause.

From the concluding paragraph of point IA on page 38 of their brief it appears appellants' contention is that the 1951 Act discriminates against trucks in favor of passenger cars. We have shown above that such discrimination does not in fact exist because the 1951 Act is framed upon the basis of equalizing the total taxes paid by trucks with those paid by passenger cars.

In any event appellants' point is without merit. This Court in *Sproles* v. *Binford*, 286 U. S. 374, sustained the propriety of separate classification of passenger-carrying vehicles as opposed to freight-carrying vehicles, saying (page 396):

> "But in passing upon the question of the constitutional power of the State to fashion its regulations for the use of the highways it maintains, we cannot ignore the fact that the State has a distinct public interest in the transportation of persons. We do not think that it can be said that persons and property, even with respect to their transportation for hire, must be treated as falling within the same category for purposes of highway regulation. The peculiar importance to the State of conveniences for the transportation of persons in order to provide its communities with resources both of employment and of recreation, the special dependence of varied social and educational interests upon freedom of intercourse through safe and accessible facilities for such transportation, are sufficient to support a classification of passenger traffic as distinct from freight. There is no constitutional requirement that regulation must reach every class to which it might be applied,—that the legislature must regulate all or none."

See also, *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm.*, 295 U. S. 285, 287, 290.

III.

The 1951 Act does not impose taxes excessive in amount and unconstitutional as asserted in point IB of Appellants' brief.

In point IB of their brief appellants urge that the taxes imposed by the 1951 Act are so unreasonable and excessive in amount as to constitute an undue burden on interstate commerce.

In considering the amount of the taxes imposed by the 1951 Act we again call attention to the fact mentioned above at page 4 of this brief that the rate increases provided by this Act are the first significant or substantial increases which have been made in license taxes for vehicles of the second division since the original enactment of the Motor Vehicle Law in 1919. The foregoing is illustrated by the chart appearing at page 309 of the Record (offered at R. 195).

It is, of course, a well known fact, of which this Court will take judicial notice, that over the last 35 years costs of construction and maintenance of highways have tremendously increased, apace with the increase in all other industrial costs and cost of living. It is also a fact known to everyone that during this period the highway systems of Illinois and all states of the United States have been vastly increased, expanded and improved. The day of the early single-lane highway is long past and we are now in the era of vast networks of wide superhighways and speedways accommodating many millions of passenger cars, passenger busses and freight carrying vehicles of all types from the small delivery truck to the huge transcontinental freight-carrying vehicles. Obviously, if Illinois is to keep abreast of this national trend in highway expansion and improvement it cannot do so on an income based upon motor vehicle license fees fixed at "horse and buggy" levels. These facts have been the subject of extensive hearings and detailed reports by committees of the Congress. See Report of Joint Committee on the Economic Report entitled *"Highways and the Nation's Economy"*, 81st Congress, 2d Session, and *"Highway Needs of the National Defense"*, House Document No. 249, 81st Congress, 1st Session. The Supreme Court of Illinois, in its opinion in the *Bode* case, 412 Ill. 204, said at page 234-235:

> "The General Assembly took legislative cognizance, and we take judicial notice, not only of the increase in cost of all types of construction since the early days of the automobile, but, likewise, that modern trucks and busses are much heavier, travel much faster, and are far more numerous than they were in those early days. The heavy cost of maintaining the State's arteries of transit must be borne by someone. The General Assembly could, as it did, place a large share of this burden of expense upon those who own and operate such heavy vehicles as trucks and busses."

We again emphasize that in increasing its motor vehicle license taxes on trucks, busses and like vehicles Illinois adopted a fair and rational scheme of taxation based on the equalization of taxes paid by such vehicles on a ton-mile basis with those paid by passenger cars. The tax has an eminently fair classification basis and, as we have shown, does not produce, when considered in conjunction with the motor fuel tax, more than the needs of the State for its highway program. In fact, the proceeds of the tax will produce only approximately 60 per cent of the State's highway maintenance and construction cost requirements.

At page 38 of their brief appellants assert "there is no known tax relating to motor vehicles that approaches in amount the tax involved in this litigation". There are two answers to this assertion.

First, the opinions of this Court make it apparent that the touchstone of validity of a motor vehicle tax under the commerce clause is whether or not the tax exceeds fair compensation to the State for the privilege of road use granted. Obviously the mere fact that the tax of a particular state may be higher than that imposed by other states does not demonstrate that such tax exceeds fair compensation for the privilege of unlimited use of the state's highways.

Second. Appellants' assertion is not true. In Appendix I attached to this brief we have applied the taxes of two other states to the operations of two of the appellants and have demonstrated that the taxes imposed by such other states exceed or closely approach those imposed by the Illinois Act. The two appellants—Cecil Kain and Koehler Transfer—with respect to whom comparisons are made in Appendix I, were chosen for the reason that they are the only appellants with respect to whom the evidence in the record is sufficiently specific as to number and weight of vehicles and mileage travelled to permit precise application of the laws of other states. In addition, in Appendix I we have demonstrated that on the basis of the weight classifications and average annual mileages used by the State in making its equalization study (Defendants' Exhibit 7, R. 307; offered R. 195) and by witness Worley in his testimony for the appellants (R. 124, 125, 134), the taxes of at least one other state exceed or closely approach those of Illinois.

Appellants point out at pages 39 and 40 of their brief that the tax of $1588 imposed by the 1951 Act on the huge vehicles in the 50,000 to 72,000 pounds class is considerably higher than any tax heretofore litigated under the commerce clause and sustained by this Court. It should be noted, however, that for the most part the taxes previously approved by this Court to which appellants refer were involved in cases decided commencing as early as 1915 (*Hendrick* v. *Maryland*, 235 U. S. 610).

As we have pointed out above, over the last 30 to 35 years there has been a tremendous increase in highway construction and maintenance costs and a vast expansion of the entire national highway system. These factors, together with the present day inflationary value of the dollar, render impossible a fair comparison between taxes imposed by

other states in a much earlier period and present Illinois taxes. It is obviously irrational to compare, as appellants do, a 1933 tax of $400 (*Hicklin* v. *Coney*, 290 U. S. 169) with a $1588 tax in 1954.

It should also be noted that the $1588 tax of which appellants complain so bitterly is applicable only to the largest and heaviest type of vehicles, namely ten wheeled vehicles in the 50,000 to 72,000 pounds weight bracket. Further, the record in this case does not disclose that any of the appellants have or intended to register vehicles in this weight classification. For many years the size and weight of trucks in Illinois have been limited by the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1951, Ch. 95½, Sec. 221). Prior to 1945 trucks weighing in excess of 40,000 pounds were not permitted to use the Illinois highways either in intrastate or interstate commerce. This Court has sustained such prohibitory regulations and has affirmed the right of a state to adjust its license fees in furtherance of the same purpose. In *Hicklin* v. *Coney*, 290 U. S. 169, this Court said (page 173):

> "Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways. It is for this reason that the authority of the State to impose directly reasonable limitations on the weight and size of vehicles, although applicable to interstate carriers, has been sustained. *Morris* v. *Duby*, 274 U. S. 135, 143; *Sproles* v. *Binford*, 286 U. S. 374, 388, 389. As the State may establish such regulations directly, the State may adjust its license fees, otherwise valid as being reasonable and exacted as compensation for the use of the highways, according to carrying capacity in furtherance of the same purpose."

Illinois, if it chose, could again prohibit trucks in this class from using the Illinois highways in both intrastate and

interstate commerce. We submit, therefore, that appellants are in no position to complain of the $1588 fee which, as we have shown, was fixed on a fair and rational basis in equalizing truck taxes with passenger car taxes.

At page 42 of their brief appellants cite examples of the tax increases resulting from the 1951 Act as applied to twelve handpicked cases out of the total of 54 appellants in the case. Appellants' position appears to be that the taxes imposed by the new Act are invalid *per se* because the increases on a percentage basis in some cases are large. But it must be borne in mind that in the two examples emphasized (Co-ordinated and Wagner Transfer Co., appellants' brief, pages 42, 43) and in other examples, the trucking concerns previously paid taxes, wholly or in part, under the mileage weight tax option. Prior to its repeal by the 1951 Act the mileage weight tax option was available to all truckers. That it was advantageous to only a very small percentage of trucking concerns is demonstrated by the fact that in 1949, for example, only 11,935 vehicles out of a total 336,044, or about 3.5 per cent, were registered under the mileage weight option (R. 307, columns 2 and 3; offered at R. 195). Obviously truckers availing themselves of the mileage weight option operated under unusual circumstances and covered only very small annual mileage in Illinois.

The Illinois legislature has seen fit to repeal the mileage weight option and to tax all truckers alike on an annual flat fee basis. This Court has repeatedly recognized the "administrative difficulties" in collecting taxes on a mileage fee basis and has on many occasions held that vehicle license fees to be valid need not be framed on the basis of mileage taxes. *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission,* 295 U. S. 285; *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542; *Aero Mayflower Transit Co.*

v. *Railroad Comm'rs.*, 332 U. S. 495; *Hicklin* v. *Coney*, 290 U. S. 169. In any event the amount of the taxes imposed by the 1951 Act may not be said to be unreasonable on the basis of a comparison of the same with the schedule of taxes in effect immediately prior to the adoption of the 1951 Act. The fact is that the appellants here and all truckers in the State of Illinois have for many years been paying taxes at ridiculously low rates fixed substantially at 1919 levels.

The burden of proof rested on the appellants to establish the unreasonableness of the fees as a burden on interstate commerce. *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 548; *Clark* v. *Paul Gray, Inc.*; 306 U. S. 583, 599; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 251. We submit that this burden has not been discharged by any evidence in the record in this case.

At page 43 of their brief appellants make great point of the plight of the Alton Box Board Co. whom they say in 1952 will be required to pay the State of Illinois $29,509 and in 1954 a total of $41,050 "for traveling three miles on the Illinois highways". Appellants attempt to make it appear that the only use of the Illinois highways made by Alton Box Board Co. is in travelling from its plant to the Illinois state line, a distance of one and one-half miles, on trips to St. Louis and again traversing the same one mile and a half on the return trip. A reading of the record (pages 61 to 65) will demonstrate that this is a gross understatement of the facts. Mr. Walter Klasner, manager of the Alton Box Board Co., testified that in 1951 the company's trucks operated a total of *one million miles* in the State of Illinois and approximately another *million miles* outside the state. It is true that some of this Illinois mileage was made up from trips to and from St. Louis, Missouri.

However, in addition the company does extensive other trucking entirely within the State of Illinois (R. 62). It is clear that the taxes paid to Illinois by this company afforded reciprocity and that for the million miles of non-Illinois travel it pays no taxes to Missouri or other states (R. 63). The unreasonableness of the position of this appellant is made apparent when it is considered that they operate 45 tractors, 110 trailers, two pickup trucks and one panel truck a total of two million miles per year (R. 61) yet feel that the $11,000 tax (approximately one-half cent per mile) paid in years prior to the effective date of the 1951 Act is too high. Klasner testified, "I think that $11,000 was too high a tax to pay for two million miles travel several years prior to 1951" (R. 64). At the same time this witness was unable to state the total amount of business done by his company or what percentage of total expense the $11,000 tax paid in 1951 and prior years bore to total operating expenses (R. 64). It is apparent that this appellant is "constitutionally" opposed to the payment of taxes.

There is no showing whatsoever in this record that the $1588 tax or any other amount in the tax schedule of the 1951 Act does in fact amount to a burden on interstate commerce or in any manner impinge upon or deter the carrying on of such commerce. The fact is that if this Court were to hold the taxes imposed by the 1951 Act invalid as applied to interstate operations, nevertheless every one of the appellants in this case would still be required to pay the full amount of the tax because of the extensive intrastate operations which they carry on. Hence, we submit, it cannot be said that because a few of the appellants in addition to their intrastate activities engage in some interstate trips, the interstate phase of their business is burdened by this tax.

IV.

The taxes imposed by the 1951 Act are not confiscatory or violative of the Fourteenth Amendment of the Constitution of the United States.

In Point II of their brief, pages 46-64, appellants argue that the taxes imposed by the 1951 Act are confiscatory and hence violative of the due process clause of the Fourteenth Amendment. In summary, the appellants contend that in some instances the motor vehicle taxes they are required to pay, including the tax increases imposed by the 1951 Act, exceed the net profits they have realized in the past and the net profits which they estimate they will make in the future. Appellants further contend they are a representative cross section of the entire trucking industry in the State of Illinois and that hence the 1951 Act is confiscatory of the entire trucking industry and invalid under the Fourteenth Amendment.

We will demonstrate that appellants' contentions are unsupported in fact and without merit in law.

Only 14 of the 54 appellants testified at the trial in this cause. These fourteen were the only trucking concerns with respect to whom evidence was introduced. Not one of these witnesses testified that the increased taxes provided by the 1951 Act would force his concern to go out of business. As pointed out in appellants' brief, a few witnesses did testify as to the net profits which have been realized by their concerns in the past and made estimates as to future annual net profits. In some cases they stated that the increased taxes required to be paid under the 1951 Act would exceed their past or estimated future net profits. It is on the basis of this testimony alone that appellants

contend the entire trucking industry in the State of Illinois is to be confiscated or destroyed. A flimsier factual foundation upon which to base such a bold assertion can hardly be conceived.

There is a complete absence of testimony and documentary evidence in the record in this case to the effect that the appellants' witnesses or their trucking concerns are representative of or a cross section of the forty appellants who did not testify or of the many thousands of other non-plaintiff concerns engaged in trucking in Illinois. Neither is there any evidence to the effect that the taxes imposed by the 1951 Act will exceed the net profits realized by the other thousands of trucking concerns or that the Act will force any trucking concerns, including the appellants, to go out of business.

Appellants have indicated at page 50 of their brief that at the trial they were prevented from introducing additional testimony as to the effect of the Act on other trucking concerns, and in this connection they refer to page 91 of the record. A reference to the record, page 91, and, in fact, a reading of the entire record, will demonstrate that although the appellees objected to the materiality of the appellants' evidence, the objection was not sustained and the trial court did not in any way limit the type or amount of testimony which the appellants were allowed to introduce.

At page 52 of their brief appellants admit that the mere fact a tax, as applied to an individual, may put such individual out of business, does not render the tax unconstitutional and void. However, they say that if the effect of the tax "on the industry as a whole" is prohibitory or confiscatory the tax is unconstitutional. We submit there is not a scintilla of evidence in the record in this case that

any trucking concern will go out of business because of the taxes imposed by the 1951 Act. Neither is there any evidence that the effect of the tax will be prohibitory or confiscatory as to the trucking industry generally.

The argument of appellants to the effect that it is impossible for members of the trucking industry to pass on to their customers the increased taxes provided by the 1951 Act (Appellants' brief, pages 63, 64) requires but little comment. As this Court is well aware, regulatory bodies that fix rates for public utilities and carriers are required to allow such utilities and carriers a fair rate of return on their investment after deduction of all operating expenses, including taxes. Every witness who testified in this case for appellants admitted that during the past fifteen or twenty years all of his operating expenses, with the exception of motor vehicle license fees, had increased substantially. Apparently the trucking industry was able to absorb such increases in operating expenses or to increase its rates to compensate for the same. The record in this case discloses no reason why the increased motor vehicle license fees provided by the 1951 Act cannot be offset by the trucking industry in the same manner as they have previously offset other increases in operating expenses.

The most that can be said for the appellants' evidence is that as to a few handpicked marginal operators the tax may be somewhat burdensome. If it were the law that a tax becomes unconstitutional if it is so large in amount as to cause a particular concern to cease business operations, it would be difficult to imagine a tax statute not subject to constitutional infirmity. It is common knowledge that in recent years property, license, income and all forms of taxes have increased substantially. In the case of any tax increase there are or may be marginal operators with re-

spect to whom the increase may cause hardship. Tax increases in many individual instances may be burdensome and result in driving certain taxpayers out of business. But such has never been held to support a constitutional objection under the Fourteenth Amendment.

At pages 58 and 59 of their brief appellants express some doubt as to whether the 1951 Act is a regulatory measure or a tax for revenue purposes. All doubt in this regard has been dispelled by the decision of the Supreme Court of Illinois in this case wherein the court stated (412 Ill. 321, 329; R. 322):

> "Recognizing the realities of the Motor Vehicle Act, it constitutes both a regulation of motor vehicles and use of the highways under the police powers of the State and also the imposition of a privilege tax on motor vehicles for the privilege of using the highways as a revenue measure."

It is well established by numerous decisions of this Court that where the legislature has the power to lay a tax as a revenue measure there is no constitutional limitation upon the amount of the tax that may be imposed. Perhaps the leading case is *McCray* v. *United States*, 195 U. S. 27. There this Court held that the Congress had power to lay a tax on colored oleomargarine and the fact that the tax was so great as to destroy the business of dealing in colored oleomargarine did not affect the validity of the act. This Court said (pages 60, 61):

> "The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases, *(Spencer* v. *Merchant,)* [125 U. S. 345, 355]

that 'the judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.'"

In *Magnano* v. *Hamilton*, 292 U. S. 40, in upholding the validity of a statute of the State of Washington imposing a large excise tax on butter substitutes sold within the state, this Court said (pages 44-47):

"Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. *Brushaber* v. *Union Pac. R. Co.*, 240 U. S. 1, 24. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329; *Heiner* v. *Donnan*, 285 U. S. 312, 326. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare *McCulloch* v. *Maryland*, 4 Wheat. 316, 423; *Child Labor Tax Case*, 259 U. S. 20, 37 *et seq.*; *McCray* v. *United States*, 195 U. S. 27, 60; *Brushaber* v. *Union Pac. R. Co.*, *supra*, 24-25; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614-615; *Nichols* v. *Coolidge*, 274 U. S. 531, 542. Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. *McCray* v. *United States*, *supra*, 56-59. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses (*Loan Association* v. *Topeka*, 20 Wall. 655, 663-664; *McCray* v. *United States*, *supra*,

56-58, and authorities cited; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48-49; *Child Labor Tax Case, supra*, 38, 40-43), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state. The present case does not furnish such a demonstration.

"The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the ten per cent. tax imposed upon the notes of state banks involved in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments. 'The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.' Again, in the *McCray* case, *supra*, answering a like contention, this court said (p. 59) that the argument rested upon the proposition 'that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.' And it was held that if a tax be within the lawful power of the legislature, the exertion of the power may not be restrained because of the results to arise from its exercise.

* * * * * *

"If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a

> contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act. As we have already seen, it was definitely rejected in the *Veazie Bank* case, where it was urged that the tax was 'so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank'; in the *McCray* case, where it was said that the discretion of Congress could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive; in the *Alaska Fish* case, from which we have just quoted; and in the *Child Labor Tax Case*, where it was held that the intent of Congress must be derived from the language of the act, and that a prohibition instead of a tax was intended might not be inferred solely from its heavy burden."

Again the same principle was reiterated in *United States* v. *Sanchez*, 340 U. S. 42, 44, where this Court said:

> "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed."

We think it is unnecessary to burden this Court with an analysis of the various authorities appellants have cited in Point II of their brief. We believe it sufficient to say that the federal decisions cited do not involve situations comparable to that presented by the case at bar and that the state decisions for the most part involved interpretations of state constitutions rather than the Federal Constitution. A number of decisions by the Supreme Court of Illinois are cited by appellants. It is obvious these authorities are meaningless in view of the last word of that court in this case (412 Ill. 321) and in *Bode et al.* v. *Barrett et al.*, 412

Ill. 204. To demonstrate the inapplicability of the authorities cited by appellants we wish to point out that the quotation from the *Ohio Tax Cases*, 232 U. S. 576, 589, set forth at page 47 of appellants' brief, leaves the impression that this Court in that case was discussing the Bill of Rights of the Federal Constitution. The fact is that the quoted portion of this Court's decision related to language used by the Ohio Supreme Court in interpreting the Ohio constitution rather than the Federal Constitution. The Court should also recognize that the parenthetical expression appearing in such quotation is the statement of appellants' counsel in this case rather than that of the Ohio court.

V.

The 1951 Act does not contain arbitrary, inconsistent, vague and uncertain classifications in violation of the Fourteenth Amendment.

In point III of their brief, pages 64 to 76, appellants argue that the 1951 Act contains numerous provisions so arbitrary, inconsistent, vague and uncertain as to amount to a violation of the Fourteenth Amendment. Altogether appellants point to nine different provisions of the Act which they assert are violative of the Constitution.

At the outset it should be noted that each of the nine contentions made in point III of appellants' brief was pleaded, briefed and argued at length in the case of *Bode et al.* v. *Barrett et al.*, 412 Ill. 204. Although the Illinois Supreme Court in its opinion in the *Bode* case did not specifically discuss each of the appellants' nine contentions, it is a fact that the same were considered and rejected by that court as follows (412 Ill. 204, 234):

> "Other questions are raised by plaintiffs and other contentions appear in the briefs of *amici curiae*. A

complete answer to most of them can be found in the authorities previously considered and principles of law emphasized in this opinion."

Likewise, each of the nine contentions made by appellants was raised, briefed, and argued in the proceedings in this cause before the Supreme Court of Illinois. Again, in its opinion in this case the Supreme Court of Illinois did not discuss individually each of these conditions but all were rejected by the court as fonows (412 Ill. 321, 331; R. 324):

> "We have given all questions raised on this appeal serious consideration, and we have reached the conclusion, in view of what we have said heretofore and our pronouncements in the recent opinion of *Bode* v. *Barrett* [412 Ill. 204] that the 1951 Amendment to the Motor Vehicle Act of Illinois is constitutional, and the decree of the trial court is reversed."

In addition, we call attention to the fact there is no claim by appellants and no evidence in the record to the effect that any of the appellants are directly or indirectly affected or injured by the nine provisions of the Act claimed to be vague and uncertain. The contentions of appellants in this portion of their brief amount to nothing more than conjecture, absent an actual application of the Act presenting a controversy. Not one of the appellants testified that in fact he was confused or misunderstood or had suffered any injury as a result of the administration of the assailed provisions of the Act. We submit that appellants have not shown they are within the class affected by any of the provisions of the Act claimed to be vague and indefinite and have not shown the existence of any justiciable issue with respect to such provisions. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583; *Hicklin* v. *Coney*, 290 U. S. 169.

We will answer the contentions of appellants in the order raised in their brief and demonstrate that the same are without merit both factually and legally.

1. Commencing at page 69 of their brief appellants assert that subsections (h) and (i) of Section 9 of the Act are inconsistent, overlapping and arbitrary. Appellants contend that certain four-wheel vehicles are taxable under both subsections. Appellants disregard the ordinary rules of punctuation and grammar. For convenience we set out below the two subsections to which appellants refer:

> "(h) Four wheel vehicles having a gross weight of more than twenty thousand (20,000) pounds, and vehicles having more than four wheels, having a gross weight of more than twenty thousand (20,000) pounds, and not more than twenty-four thousand (24,000) pounds, including the weight of the vehicle and maximum load, $251.00 until January 1, 1954, and thereafter $352.00.
>
> "(i) Four or more wheeled vehicles having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty thousand (30,000) pounds, including the weight of the vehicle and maximum load, $420.00 until January 1, 1954, and thereafter $588.00."

A reading of those two subsections shows that appellants are straining in vain to create confusion where none exists. Subsection (h) clearly comprises four wheel vehicles and vehicles having more than four wheels in the gross weight range from 20,000 to 24,000 pounds. Obviously the clause "• • •, and not more than twenty-four thousand (24,000) pounds, • • •" modifies both prior clauses of the subsection. This construction is required by all rules of grammar and punctuation. The quoted clause is set off by commas at each end but appellants ignore the first comma.

Also, such a construction harmonizes perfectly with subsection (i), since the latter clearly comprises "four or more wheeled vehicles having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty thousand (30,000) pounds."

Appellants particularly complain of the application of these two subsections to a four wheeled truck weighing in excess of 30,000 pounds; and at page 69 of their brief they state that such a vehicle would be taxable only under subsection (h). A reading of subsection (h) makes it clear that it does not apply to any vehicle weighing in excess of 24,000 pounds gross.

In any event it should be noted that the testimony of appellants' witnesses, Houska (R. 162-166) and Kennedy (R. 166-167), shows that no four wheeled vehicles weighing in excess of 30,000 pounds gross have ever been found to be operating on the Illinois highways except in a few cases, in all of which such vehicles were operating illegally in that the rear axle bore a gross weight of more than 18,000 pounds in violation of Section 228 (a), Chap. 95½, Ill. Rev. Stat. 1951. There is no testimony in the record in this case that any one desires or intends to operate on the Illinois highways a four wheeled vehicle weighing in excess of 30,000 pounds which does not exceed the above mentioned axle load limitation.

2. At page 70 of their brief appellants contend that subsections (i-3) and (i-4) of the Act are overlapping and inconsistent. Under fundamental principles of statutory construction and the maxim *expressio unius est exclusio alterius* (*I.C.R.R. Co.* v. *Franklin County*, 387 Ill. 301, 313) it is clear that vehicles having ten or more wheels are to be taxed under subsection (i-4) and not under subsection (i-3) of Section 9.

3. At pages 70 to 72 of their brief appellants complain that certain passenger carrying busses operating within municipalities or a close radius thereof and equipped with hydraulic shock absorbers and whose rates are subject to regulation by the Illinois Commerce Commission are af-

forded lower rates of taxation than are property carrying vehicles of the same weight and equipment. The leading authority sustaining separate classifications of trucks and passenger carrying busses is *Sproles* v. *Binford,* 286 U. S. 374. There a Texas act limited the net load of freight carrying vehicles to 7,000 pounds, but placed no limitation whatsoever upon the weight or net load of passenger carrying vehicles. The truck operators charged that this constituted an unconstitutional discrimination in favor of passenger carrying vehicles and against freight vehicles. This Court held the classification valid saying (p. 396):

> "But in passing upon the question of the constitutional power of the State to fashion its regulations for the use of the highways it maintains, we cannot ignore the fact that the State has a distinct public interest in the transportation of persons. We do not think that it can be said that persons and property, even with respect to their transportation for hire, must be treated as falling within the same category for purposes of highway regulation. The peculiar importance to the State of conveniences for the transportation of persons in order to provide its communities with resources both of employment and of recreation, the special dependence of varied social and educational interests upon freedom of intercourse through safe and accessible facilities for such transportation, are sufficient to support a classification of passenger traffic as distinct from freight. There is no constitutional requirement that regulation must reach every class to which it might be applied, —that the legislature must regulate all or none."

The separate classification of busses operating within municipalities or a close radius thereof is clearly proper. It is a fact of common knowledge that such busses pay municipal franchise taxes which are usually substantial in amount. The passenger fares charged on such busses are subject to regulation by the Illinois Commerce Commission

(Ill. Rev. Stat., 1951, Chap. 111⅔, Art. IV), and hence any taxes paid by operators of such busses must ultimately be borne by the riding public. Also the territory in which such busses may operate is confined by the operating authority obtained from the municipality and the Commerce Commission (Ill. Rev. Stat., 1951, Chap. 111⅔, Sec. 56; Ill. Com. Comm. Gen. Ord. No. 153 [June 18, 1940]). In view of the foregoing the legislature could reasonably have concluded that it was desirable to impose lower annual State license fees on such busses in order to afford a greater area for local taxation.

4. At page 73 of their brief appellants contend that the Act does not impose a tax on "Six or more wheeled vehicles under 30,000 pounds". A mere reading of the statute demonstrates the frivolity of appellants' contention. Obviously a six wheeled vehicle weighing from 24,000 to 30,000 pounds would be taxed under subsection (i); a six wheeled vehicle weighing from 20,000 to 24,000 pounds would be taxed under subsection (h); and a six wheeled vehicle weighing less than 20,000 pounds would be taxed under the preceding subsections.

5. At page 73 of their brief appellants complain that there is no provision in the Act permitting the registration and taxation of a tractor only. Appellants are here referring to the type of tractors used to pull other vehicles such as semi-trailers. It is true that the Act does not provide a tax for a tractor alone. We submit, however, there is nothing unreasonable in requiring the owner of a tractor designed to pull a semi-trailer to pay a registration fee for the combined weight of the tractor and semi-trailer since the only function of the tractor is to pull a semi-trailer. In part appellants' complaint is that since no separate tax is provided for a tractor alone such vehicles are unduly favored in that they are permitted to use the Illinois high-

ways tax free. Such, of course, is not the fact for a tractor must be registered and a tax paid with respect to it in combination with a semi-trailer.

6. At page 73 of their brief appellants complain that the terms "gross weight" and "maximum load" used in Section 9 of the Act are vague, uncertain and incapable of understanding without the assignment of an arbitrary definition. That this contention is without foundation is demonstrated by the opinion of the Supreme Court of Illinois in *Bode* v. *Barrett*, 412 Ill. 204, where that court said (page 230):

> "Plaintiffs also contend that the act, by failing to define gross weight of maximum load, is unconstitutional because of being vague, indefinite and a delegation of legislative authority. This precise language has been continuously in section 9 of the act without change since its original enactment. The evidence shows that the meaning of this phrase has been well understood and has had a continuity of legislative and administrative interpretation of thirty-two years and that the same has caused no confusion, and no one in the case testified as to the existence of any confusion or misunderstanding in respect thereto. The owner in applying for registration states under oath, in his application, the weight of his vehicle, the maximum load and the sum of the two, being the gross weight. The term maximum load has been consistently interpreted as the maximum load the owner intends to carry during the registration period. The Motor Vehicle Law prohibits the use of the highways by a vehicle the gross weight of which exceeds that stated in the application blank and the evidence carried on the plates on the vehicle. Such language is clear and definite and does not delegate any legislative authority to the Secretary of State."

This construction of the statute by the Supreme Court of Illinois disposes of appellants' contention of uncertainty. *Hicklin* v. *Coney*, 290 U. S. 169, 172; *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 613.

7. At page 74 of their brief appellants assert that the phrase "like exemption and privileges" appearing in Section 20 of the Act is vague, uncertain and incapable of clear understanding.

We think extended argument is unnecessary to show that the phrase in question is entirely clear and certain and appellants do not point out wherein the phrase is vague or indefinite. It is obvious that the legislature in adopting Section 20 intended to extend reciprocity to nonresidents of Illinois to the extent that other states granted Illinois residents tax-free use of their highways. It is difficult to comprehend wherein uncertainty or speculation could arise from such a provision. All that is required is the measurement of the motor vehicle tax provisions of another state's laws against the provisions of the Illinois law.

8. At page 75 of their brief appellants assert the contention that the phrase "a close radius thereof" is indefinite and uncertain. With reference to this phrase the Supreme Court of Illinois, in *Bode et al.* v. *Barrett et al.*, 412 Ill. 204, stated at page 230:

> "Thus the phrase 'or a close radius thereof' expresses a well-recognized, ascertainable, unambiguous concept."

This finding of the Supreme Court of Illinois is final and controlling and presents no federal question for review by this Court. *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 613; *Hicklin* v. *Coney*, 290 U. S. 169, 172.

9. Commencing at page 75 of their brief appellants urge that the phrase "agricultural pursuits" appearing in Section 9 of the Act is vague, indefinite and uncertain. As stated by the Supreme Court of Illinois in *Bode et al.* v. *Barrett et al.*, 412 Ill. 204, 234, the appellants' contention is "not well taken in view of the long line of decisions consist-

ently holding valid, both under State and Federal constitutions, such provisions similar to those under consideration." Appellants' conjecture as to future action of the Secretary of State of Illinois raises no issue requiring consideration by this Court. As this Court has indicated on many occasions, it will not anticipate that the action of a state official in administering state laws will be arbitrary and capricious so as to invalidate constitutional rights, and that the court is not called upon to decide such an issue until factually an actual case of alleged unconstitutional and arbitrary action is presented. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 369; *Hicklin* v. *Coney*, 290 U. S. 169, 172-3.

Conclusion.

For the reasons contained in the argument above it is respectfully submitted that the final judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

IVAN A. ELLIOTT,
Attorney General of
State of Illinois,
160 North LaSalle Street,
Chicago, Illinois,

JOHN T. CHADWELL,
Special Assistant
Attorney General,
135 South La Salle Street,
Chicago, Illinois,

FRANK M. PFEIFER,
Special Assistant
Attorney General,
Security Building,
Springfield, Illinois,

RICHARD M. KECK,
Special Assistant
Attorney General,
135 South La Salle Street,
Chicago, Illinois;

Attorneys for Appellees.

APPENDIX I.

In this appendix we set forth three tables (Table A, Table B and Table C) in which the Illinois tax is compared with taxes in Oregon and North Dakota. The principal factor in the total amount of the Oregon taxes is a weight-mile tax, based on the gross weight of the vehicle and the miles traveled. Reciprocity with respect to this weight-mile tax is not granted. Hence truckers from other states must pay this tax in Oregon, and Oregon truckers must pay taxes in other states in which they operate. The North Dakota tax is on a flat annual basis. North Dakota grants reciprocity as does Illinois.

North Dakota and Oregon were used for comparative purposes because their statutes impose taxes framed in such form as to facilitate comparison with Illinois taxes. There is such a wide variety of bases of motor truck taxation that comparison of Illinois taxes with those of many states would require involved assumptions and computations and the use of numerous factors not of record. The tables herein are based on facts of record and easily understood statutes.

The statutes of Oregon and North Dakota on which the tables are based are the following:

Oregon: Laws of 1951, Chapters 410 and 428. Chapter 410 requires an annual registration tax of $0.70 per hundred-eight of unladen weight. The following tables assume that the unladen weight is one-third of the gross weight. We believe this to be an ultra conservative estimate. Chapter 428 provides for the weight-mile tax.

North Dakota: Laws of 1951, Chapters 244 and 246, require annual taxes based on gross weight of vehicle and load. Sections 49-1832 and 49-1841, Rev. Code, 1943, require annual fees of $30 per vehicle from carriers for hire.

Table A and B use data taken from the evidence relating to Cecil Kain (R. 69) and Koehler Transfer (R. 77). These tables compare the taxes which will be paid by these parties in Illinois in 1952-53 and 1954 with the

taxes they would have to pay to conduct the same operations in 1952 in Oregon and North Dakota.

Oregon has a six cents per gallon gasoline tax, whereas the Illinois tax (four cents in 1952) will be five cents in 1953 and 1954. The North Dakota tax is five cents. Therefore to compare with complete accuracy present Oregon taxes with Illinois taxes required to be paid in 1953 and 1954 would necessitate adding to total Oregon taxes one cent of gasoline tax for each 4.3 miles of travel (R. 307, Col. (7); offered at R. 195). However, in the interest of simplicity we have not added this factor to the Oregon taxes shown in the tables.

Kain testified that he had one tractor registered for 59,000 pounds gross weight for which he would pay in license taxes under the 1951 Act $894 in 1952 and 1953, and $1250 in 1954. His mileage totaled 53,000 (R. 69-70). On that basis his taxes in Oregon and North Dakota would compare with Illinois taxes as follows:

Table A.

Illinois			
1952-53	1954	Oregon	North Dakota
$894	$1250	$1940	$1130

It will be observed that Kain's taxes would be $236 per year higher in North Dakota in 1952 and in 1953 than in Illinois, and $120 less in North Dakota in 1954. His taxes in Oregon would be more than twice the Illinois taxes in 1952 and 1953, and $690 more than the Illinois taxes in 1954.

Witness Koehler of appellant Koehler Transfer testified that they have three trucks, two licensed for 41,000 pounds and one for 55,000 pounds gross weight; that their Illinois licenses in 1952 and 1953 will cost $2184 and in 1954 will cost $3050; and that their total mileage in Illinois in 1951 was 125,000 miles (R. 77-78). He did not divide the mileage among the trucks, and for the purpose of the following comparison we have divided it equally among the three, resulting in 41,666 miles per annum per vehicle.

Table B.

Illinois Taxes 1952-53	Illinois Taxes 1954	Oregon Taxes	North Dakota Taxes
$2184	$3050	$3214	$2080

In Table C following, column (1) sets out the weight brackets in subsections (a) to (i-4) of the 1951 Act, and column (2) is derived from column (4) of defendants' Exhibit 7, (R. 307; offered at R. 195). The Oregon taxes shown in column (5) are the amounts that would be required for operating in Oregon vehicles of the gross weights and mileages shown. It will be noted that the present Oregon taxes exceed by substantial amounts all categories of the Illinois taxes for 1952 and 1953, exceed the Illinois taxes for 1954 in eight brackets, and closely approach them in seven brackets.

Table C.

Weight of Vehicle (pounds)	Average Mileage per Year	Illinois Tax 1952 1953	1954	Oregon Tax
(1)	(2)	(3)	(4)	(5)
3,000 & less....	7,500	$ 10.	$ 10.	$ 21.
3,001 to 8,000..	10,000	20.	26.	41.
8,001 to 10,000..	12,500	46.	63.	66.
10,001 to 12,000..	16,000	67.	92.	100.
12,001 to 14,000..	18,500	86.	119.	123.
14,001 to 16,000..	20,500	106.	146.	152.
16,001 to 20,000..	23,500	159.	221.	187.
20,001 to 24,000..	28,000	256.	357.	350.
24,001 to 30,000..	36,500	425.	593.	562.
30,001 to 36,000..	36,500	584.	815.	686.
36,001 to 41,000..	36,500	640.	895.	844.
41,001 to 45,000..	36,500	705.	985.	962.
45,001 to 50,000..	36,500	789.	1,103.	1,073.
50,001 and over.. (8 wheel)	36,500	894.	1,250.	1,379.
50,001 to 72,000.. (10 wheel) ...	36,500	1,139.	1,593.	1,737.